

No. 14,330

United States Court of Appeals
For the Ninth Circuit

ACE TRACTOR & EQUIPMENT Co., INC.,
Appellant,

vs.

OLYMPIC STEAMSHIP Co., INC.,
Appellee.

APPELLEE'S REPLY BRIEF.

LASHER B. GALLAGHER,
1256 West First Street, Los Angeles 26, California,
Proctor for Appellee.

FILED

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**PAUL P. O'BRIEN,
CLERK**

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PREFATORY STATEMENT.

Appellant attempts to make the point that "Olympic made payment to Calvin H. Sides as a volunteer and thus is not entitled to indemnity." (Appellant's Opening Brief, p. 18.)

Appellee is quite surprised by this contention of appellant. The undersigned proctor had personal knowledge and recollection of what had occurred during the oral argument in the trial Court and believed that he had the right to assume that the Appellant would not assert, in the, United States Court of Appeals, anything contrary to the position the Ace Tractor & Equipment Company took in the Court below. For that reason Appellee did not insist upon the oral

argument presented to the trial judge being included within the record on appeal.

Under the circumstances shown by the actual record as made in the trial Court, and the contrary position taken by the Appellant in its brief filed in the office of the clerk of this Honorable Court, Appellee feels more than justified in quoting from the record as shown by the reporter's transcript of the proceedings at the oral argument presented to the trial judge. If the Appellant denies that its statements to the trial Court are not accurately set forth herein, Appellee will take the necessary steps to make the oral argument a part of the record on appeal.

Gordon H. Wright, Esq., Appellant's proctor who tried the case in the trial Court, in the course of his argument after the introduction of all of the evidence, stated to the trial judge, as follows:

“I submit, your Honor, that here is a case in which the ship owner clearly had a duty to its employees to provide a safe and seaworthy place in which to work. There is no question but what there was liability on the part of the vessel owner, in the first instance.

* * * * *

“With regard to State Steamship Co. v. Rothschild case Mr. Gallagher would say he is entitled to indemnification on the basis of that case. I think the State Steamship Co. case does establish the proposition which Mr. Gallagher is arguing here, that is, if he can prove that the stevedores were responsible for the injury, that then they can recover.”

Because of the standing at the bar of proctors for Appellant, Appellee believes that the attempt of Appellant to assert a point in its opening brief on appeal, contrary to statements and concessions made by its proctor in the trial Court, is the result of inadvertence and a failure on the part of the author of Appellant's brief to remember what occurred during the course of the trial and particularly what was said during the oral argument of its proctor.

STATEMENT OF THE CASE.

On May 28, 1948, at San Francisco, California, the Olympic Steamship Company and Ace Tractor and Equipment Company entered into a voyage charter party. Said charter party was offered in evidence by Ace Tractor and Equipment Company and was marked in the Court below as Respondent's Exhibit B.

Said charter party provides, in part, as follows:

"F. Stevedoring: Loading, stowing, trimming and discharging expenses to be for Charterer's account.

* * * * *

"I. Special provisions: * * *

2. Overtime to Vessel's crew in connection with loading and discharging of cargo to be for Charterer's account. * * *

5. At loading port, Charterers to use crew members for loading vessel, and payment to be made by Charterers in accordance with Owners' Alaska Labor Agreements." (Respondent's Exhibit B, p. 1.)

“The Vessel will permit the use of ship’s winches and other appropriate gear actually on board. The Vessel will at all times provide power sufficient to run all the winches, or all necessary to be worked. * * *”. (Respondent’s Exhibit B, p. 2.)

Libelant’s Exhibit No. 1, in the Court below, is a “Pre-Trial Stipulation.”

Said stipulation was introduced in evidence without any objection of any kind or character by Appellant. (Record pp. 51-52.)

Said Pre-Trial Stipulation reads as follows:

“It is Stipulated, as follows:

I.

At all times mentioned in the libel the Ace Tractor and Equipment Co., Inc., was and it now is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California, Central Division.

II.

At all times mentioned in the libel the Olympic Steamship Co., Inc., was and it now is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the Western District of Washington, Northern Division.

III.

At all times mentioned in the libel the Olympic Steamship Co., Inc., was the Bare Boat Charterer

of the SS 'Edward A. Filene,' a merchant vessel of the United States. Calvin H. Sides was employed by the Olympic Steamship Co., Inc., on said vessel as radio operator and seaman for a voyage commencing on or about the 1st day of June, 1948, at San Francisco, California, to Alaskan waters and return and said Calvin H. Sides sustained the bodily injuries referred to in the libel while taking part in the loading of cargo in one of the holds of said vessel during the course of said voyage. Ace Tractor and Equipment Co., Inc., reserves the right to prove that at the time of sustaining said bodily injuries Calvin H. Sides was an employee of said Ace Tractor and Equipment Co., Inc.

IV.

On or about May 28, 1948, Olympic Steamship Co., Inc., as Bare Boat Charterer and Ace Tractor and Equipment Co., Inc., as Voyage Charterer, entered into a Voyage Charter Party at San Francisco, California, wherein and whereby said Ace Tractor and Equipment Co., Inc., chartered said vessel, the SS 'Edward A. Filene,' for a voyage commencing on or about the 1st day of June, 1948, from San Francisco, California, to Alaskan waters and return. That said Voyage Charter Party provides, in part, as follows:

'The Charterer agrees to provide and pay for workmen's compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner, upon demand, a cer-

tificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractor appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them.'

V.

That on or about the 19th day of June, 1948, at about the hour of 2:30 p.m. on said day, said vessel was in navigable waters at Amchitka, Aleutian Islands, *and the Ace Tractor and Equipment Co., Inc., a corporation, was in charge and control of the loading of cargo in the lower No. 4 hold of said vessel.*

VI.

At all times mentioned in the libel the winch driver who was operating the loading gear attached to a wire cable in the lower No. 4 hold of said vessel was an employee of Ace Tractor and Equipment Co., Inc., and was acting in the course and scope of his employment as such winch driver.

VII.

On said 19th day of June, 1948, a certain wire or steel cable, sometimes referred to as a 'strap' and *used in connection with the loading of said cargo*, parted, thereby permitting a sling load of steel mats, weighing approximately 2,000 pounds, to swing and strike the said Calvin H. Sides with great force and violence and leaving him pinned

under said sling load and at said time and place said Calvin H. Sides sustained injury as hereinabove set forth. At and about said time the said Calvin H. Sides was engaged in assisting in the loading of said cargo.

VIII.

That on or about the 18th day of January, 1949, the said Calvin H. Sides filed an action at law in the United States District Court, Western District of Washington, Northern Division, against the Olympic Steamship Co., Inc., alleging in said action that he, the said Calvin H. Sides, was an employee of said Olympic Steamship Co., Inc., on June 19th, 1948; that on said date when said vessel was at Amchitka, Aleutian Islands, loading cargo, the said Calvin H. Sides was then in the course of his employment in the lower No. 4 hold of said vessel, SS 'Edward A. Filene'; that at said time and place said vessel was unseaworthy in that the wire cable installed in said hold to which the loading gear of said vessel was connected was defective and unable to support the weights for which it was intended; that the winch driver in the course of his employment carelessly and negligently operated said loading gear as to place an excessive strain on said wire cable; that as a direct and proximate result of the unseaworthiness of the vessel and the negligence of the said Olympic Steamship Co., Inc., as aforesaid, said wire cable parted, causing a sling load of steel mats, weighing in excess of 2,000 pounds, to swing and strike the said Calvin H. Sides with great force and violence and leaving him pinned

under said sling load and as a direct and proximate result of the unseaworthiness of the said vessel and the negligence of the Olympic Steamship Co., Inc., as aforesaid, said Calvin H. Sides sustained severe and permanent injuries, as hereinabove set forth; that said Calvin H. Sides further alleged that at the time of receiving said injuries he was an able bodied man of the age of 39 years with a normal life expectancy of 28.90 years, capable of earning and actually earning the sum of \$500.00 a month as a radio operator and seaman; that ever since said 19th day of June, 1948, said Calvin H. Sides has been and now is and for a long period of time in the future will be totally incapacitated from following any gainful occupation; that his back and his left leg have been permanently injured and weakened; that the full extent of his injuries and disability is still unknown to him; that his ability to follow any gainful occupation has been permanently impaired; that he has suffered extreme pain in the past, now suffers and will suffer such pain in the future, to his total damage in the total sum of \$50,000.00.

IX.

On January 4, 1950, Ace Tractor and Equipment Co., Inc., by and through Raymond G. Stanbury, Esq., who at said time was acting as the agent of said Ace Tractor and Equipment Co., Inc., and in the course of his authority as such agreed that the case of Calvin H. Sides v. Olympic Steamship Co., Inc., then pending in the United States District Court, Western District of Wash-

ington, Northern Division, could be settled by Olympic Steamship Co., Inc., without prejudice to Ace Tractor and Equipment Co., Inc., by the payment by said Olympic Steamship Co., Inc., to said Calvin H. Sides of the sum of \$14,000.00, and Ace Tractor and Equipment Co., Inc., agreed that said sum of \$14,000.00 was a fair and reasonable sum to be paid to said Calvin H. Sides, and said agreement as made by Ace Tractor and Equipment Co., Inc., in consideration of Messrs. Bogle, Bogle & Gates, attorneys of record for Olympic Steamship Co., Inc., in said action then pending in the United States District Court, Western District of Washington, Northern Division, hereinabove referred to, obtaining from said Calvin H. Sides a dismissal with prejudice of his action then pending in the Superior Court of the State of California in and for the County of Los Angeles, entitled Calvin H. Sides, Plaintiff, vs. Ace Tractor and Equipment Co., Inc., a corporation, being number 558,573 amongst the files of said Superior Court of the State of California, in and for the County of Los Angeles.

X.

On the 16th day of January, 1950, with the written consent and approval of Ace Tractor and Equipment Co., Inc., as aforesaid, Olympic Steamship Co., Inc., settled and compromised the claim of said Calvin H. Sides against said Olympic Steamship Co., Inc., for the sum of \$14,000.00, and upon receipt of said sum of \$14,000.00, said Calvin H. Sides executed and delivered to Olympic Steamship Co., Inc., a receipt and release, by the

terms of which said Calvin H. Sides did release, discharge and forever acquit the SS 'Edward A. Filene,' her agents, owners, officers and crew and charterers, Olympic Steamship Co., Inc., a corporation, and/or any and all other persons, firms or corporations having any interest in or connection with said SS 'Edward A. Filene,' of and from any and all claims, demands or charges of whatsoever nature, and from any and all damages, injuries, actions or causes of action either at law, in equity or admiralty, for negligence or otherwise, including claim for wages, maintenance and/or cure, arising out of or in connection with the accident sustained by said Calvin H. Sides on or about the 19th day of June, 1948, while he was employed as radio operator aboard said vessel, which said accident and injuries resulting therefrom were the subject matter of the action commenced by said Calvin H. Sides against Olympic Steamship Co., Inc., in said United States District Court, Western District of Washington, Northern Division, and for and in further consideration of the payment by Olympic Steamship Co., Inc., to said Calvin H. Sides of said sum of \$14,000.00, the said Calvin H. Sides did also release, discharge and forever acquit the Ace Tractor and Equipment Co., Inc., its agents and owners and/or any and all other persons, firms or corporations having any interest in or connection with said Ace Tractor and Equipment Co., Inc., a corporation, of and from any and all claims, demands or charges of whatsoever nature and from any and all injuries, actions or courses of action, either at law, in equity or admiralty, for negligence or

otherwise, including claim for wages, maintenance and/or cure arising out of or in connection with said accident hereinabove described, resulting in the injuries to said Calvin H. Sides, as hereinbefore described, and said Calvin H. Sides authorized his attorneys to dismiss with prejudice and without costs that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Calvin H. Sides, Plaintiff, vs. Ace Tractor and Equipment Co., Inc., a corporation, Defendant, No. 558,573, *the basis of said action being the negligence of the Ace Tractor and Equipment Co., Inc., a corporation, which caused the accident and injuries, as described hereinabove*; that the said dismissal with prejudice of the said action was entered in the records of said Superior Court on February 3, 1950.

XI.

That on March 29, 1949, Olympic Steamship Co., Inc., tendered to Ace Tractor and Equipment Co., Inc., the defense of said action filed by the said Calvin H. Sides in said United States District Court, Western District of Washington, Northern Division, against said Olympic Steamship Co., Inc., and said Ace Tractor and Equipment Co., Inc., refused to accept the defense of said action on behalf of said Olympic Steamship Co., Inc.

XII.

That by reason of the relationship existing between Olympic Steamship Co., Inc., and said Calvin H. Sides, said Olympic Steamship Co.,

Inc., owed to said Calvin H. Sides the duty to provide him with a seaworthy vessel and appliances and a reasonably safe place to work.

XIII.

The allegations of Article Thirteenth in said libel will be admitted upon the submission for inspection of satisfactory written evidence of the payment of each of said items referred to therein.

Dated: January 11th, 1952.

/s/ Lasher B. Gallagher,
Proctor for Libelant.

Lillick, Geary & McHose,

By /s/ Gordon K. Wright,
Proctors for Respondent Ace Tractor
and Equipment Co., Inc.”

(Appendix to brief of Appellant pp. 173-181;
emphasis added.)

Documentary evidence introduced during the course of the trial consists of the following: Libelant's Exhibit No. 4, Libelant's Exhibit No. 5, Libelant's Exhibit No. 6, and Respondent's Exhibits C, D and E.

Libelant's Exhibit 4 is a letter dated March 22, 1949 addressed and delivered to Ace Tractor and Equipment Company wherein Messrs. Bogle, Bogle & Gates, on behalf of the Olympic Steamship Company, made certain accusatory statements of fact to Appellant.

Said letter reads, in full, as follows:

“Bogle, Bogle & Gates
6th Floor, Central Building
Seattle 4

March 22, 1949.

Ace Tractor & Equipment Co., Inc.,
Southgate, California.

Re: Calvin H. Sides v. Olympic Steamship Co.,
Inc., SS ‘Edward A. Filene.’

Gentlemen:

On behalf of the Olympic Steamship Co., Inc., owners of the above vessel, we desire to advise you that Calvin H. Sides, a Radio Operator on the vessel, has instituted an action against the Olympic Steamship Co., Inc., in the United States District Court, Western District of Washington, Northern Division, being Civil Action No. 2179, seeking recovery of damages for an injury received to his back, left leg and foot, on or about June 19, 1948, *when your agents, servants and employees in the course of loading cargo into No. 4 lower hold of the vessel, caused a portion of the gear supplied by you to part. This resulted from the negligence of a young and inexperienced winch driver employed by you to operate the winches at this particular hatch.*

Sides is seeking recovery of \$50,000.00 damages.

Our investigation indicates that although the gear and rigging supplied by the ship for your use was in *perfect* condition, *your* winch driver *caused the gear* to become *tight-lined*, resulting in the breaking of a steel strap in the lower hold.

The portion of cargo which was being loaded at the moment then swung across the lower hold of the vessel, striking Sides and causing the injuries above mentioned.

Our investigation further discloses that although Sides was the radio operator aboard the vessel, he was, at the time of this loading at Amchitka, Alaska, employed by you for stevedoring operations.

Further, we call your attention to Paragraph 2 (c) of the Voyage Charter Party, executed between yourselves and the Olympic Steamship Co., Inc., on May 28, 1948:

‘(c) The Charterer agrees to provide and pay for workmen’s compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner upon demand a certificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractors appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them.’

In view of these facts and on behalf of Olympic Steamship Co., Inc., bareboat chartered owners of the SS ‘Edward A. Filene’, we hereby tender you the defense of this pending action.

We enclose copies of the complaint and the answer which we have filed for your information. We shall be pleased to make our file available for your attorneys or yourselves for inspection.

In the event you fail to accept this tender of defense, please be advised that the Olympic Steamship Co., Inc., will be obliged to look to you for reimbursement for any judgment obtained in this matter against Olympic Steamship Co., Inc., and for the costs of conducting the defense to the action, including a reasonable attorneys' fee in the matter.

Would you be good enough to advise us if you will accept this tender of defense, so we may proceed accordingly?

Very truly yours,

Bogle, Bogle & Gates,
By /s/ Robert V. Holland,

Encl.”

(Appendix to Brief of Appellant, pp. 190-192; emphasis added.)

The only answer made by Ace Tractor & Equipment Company to the said letter of March 22, 1949, is libelant's exhibit No. 5. Said exhibit reads as follows:

“May 20, 1949.

Messrs. Bogle, Bogle & Gates,
6th Floor, Central Building,
Seattle 4, Washington.

Re: Sides v. Ace Tractor and Equipment
Co., Inc.

Gentlemen:

We are the attorneys for the Ace Tractor and Equipment Company and as such have had re-

ferred to us your demand, dated March 22, 1949, that it accept the defense of the case brought against your client, Olympic Steamship Co., by Calvin H. Sides, which action is number 2179 in the United States District Court, Western District of Washington, Northern Division. We have advised our client that it has no obligation to defend that action under the terms of the 'Voyage Charter Party' to which you refer and your demand is therefore respectfully declined.

Very truly yours,
 Parker, Stanbury &
 Reese,
 By Raymond G. Stanbury.

RGS:HC

cc: Messrs. Cannon & Callister.

cc. Messrs. Levinson & Friedman and Dee B. Tanner."

(Appendix to Brief of Appellant, p. 193.)

Libelant's Exhibit No. 6 is another letter written by Messrs. Bogle, Bogle & Gates to Ace Tractor and Equipment Company under date of December 10, 1949. Said letter reads as follows:

“Bogle, Bogle & Gates
6th Floor, Central Building,
Seattle 4, Washington

December 10, 1949.

Registered

Return Receipt Requested

Ace Tractor & Equipment Company, Inc.,
5210 East Firestone Boulevard,
South Gate, California
Attention: Mr. B. Shea

Re: Calvin H. Sides v. Olympic Steamship
Co., Inc.

Gentlemen:

On March 29, 1949, we tendered the defense of the above lawsuit to you through Mr. Murray H. Roberts of Wilmington, California. This tender was rejected in a letter from Messrs. Parker, Stanbury & Reese under date of May 20, 1949.

We now enclose a copy of a letter we have received from Messrs. Levinson & Friedman setting forth a \$20,000.00 demand. We believe it is possible that this figure may be altered downward as the trial date of January 3, 1950, approaches.

We might advise that we have available for the trial by deposition and in person the various crewmen and Ace Tractor longshoremen who were working in the hold at the time of Sides' injury. *These men all state that the particular strap which broke was one supplied by Ace Tractor & Equipment Company and they also state that the Ace Tractor winch driver who tight-lined the load, causing the strap to break, was obviously inexperienced.*

Would you kindly send us immediately your instructions for further disposition of this matter? We might advise that we would be willing to recommend to our principals that a small contribution be made to any settlement which you may deem fit to direct.

Very truly yours,

Bogle, Bogle & Gates
By Robert V. Holland.

Encl.

cc. Messrs. Parker, Stanbury & Reese
(Registered)."

(Appendix to Brief of Appellant, pp. 194-195;
emphasis added.)

Ace Tractor & Equipment Company made no answer whatever to Libelant's Exhibit No. 6.

Respondent also introduced as its evidence the said letter of December 10, 1949, as Respondent's Exhibit D. Said Exhibit D sets forth a copy of the letter of Levinson & Friedman referred to in Libelant's Exhibit No. 6. The third letter which is a part of Respondent's Exhibit D reads as follows:

“Law Offices
 Cannon & Callister
 650 South Spring Street
 Los Angeles 14

December 16, 1949

Raymon G. Stanbury, Esq.
 Parker, Stanbury & Reese
 707 South Hill Street
 Los Angeles 14, California

In re: Calvin H. Sides vs. Olympic
 Steamship Co., Inc.

Dear Ray:

The enclosed letter has been forwarded to me by the Ace Tractor & Equipment Company.

Since you are handling this matter, will you kindly make what reply, if any, is necessary to this letter on behalf of the Ace Tractor & Equipment Company.

Very truly yours,

/s/ Reed E. Callister
 Reed E. Callister
 Of Cannon & Callister

REC/S
 Encl. 1''

The only answer made by or on behalf of Ace Tractor & Equipment Company to any of the foregoing letters written to it was the letter of May 20, 1949 written by Raymond G. Stanbury as attorney for Ace Tractor & Equipment Company. (Record p. 159, Recross Examination of Raymond G. Stanbury; testimony of Lee R. Brunell, President of Ace Tractor & Equipment Company, Record pp. 98-112.)

Respondent's Exhibit C consists of a letter written by Olympic Steamship Company to Ace Tractor & Equipment Company, dated July 8, 1948. This letter reads, in part, as follows:

"In accordance with terms of Charter Party, dated May 28, 1948, at San Francisco, between Ace Tractor & Equipment Co., and the Olympic Steamship Co., Inc., we are attaching hereto invoice covering *crew overtime paid for work performed* which was *directly connected with the cargo operation*.

In support of this invoice, you will find attached thereto, copies of overtime sheets itemizing the actual hours worked and bearing the signature of your representative indicating authorization and acceptance of the time as being worked for your account.

This invoice covers up to and including loading time at Amchitka. The balance of the crew work falling into this category will be billed in the near future, after such hours have been checked and approved by your representative. * * *"
(Emphasis added.)

A full and fair resume of the testimony is as follows:

Deposition of Gene Southerland.

"Q. Will you state your name, please?

A. Gene Southerland.

* * * * *

Q. What is your occupation?

A. Seaman, winch driver.

Q. How long have you been going to sea?

A. About 15, 16 years.

Q. Have you followed the sea most of your working career?

A. Waterfront since I was just a kid.

Q. I see. Have you done other work on the waterfront other than as a seaman?

A. Walking boss, winch driver, work in the hold.

* * * * *

Q. Did you ever serve aboard the Edward A. Filene?

A. You mean as a crew member? Not as a crew member.

Q. Let me correct that. Did you ever work aboard the Edward A. Filene?

A. Yes.

* * * * *

Q. Mr. Southerland, on June 19, 1948, a seaman aboard the Edward A. Filene was injured at Amchitka, Alaska. Will you state whether or not you were present at that time?

A. Yes, sir. I was walking boss for the Ace Tractor Company at the time.

Q. And what was the ship doing at Amchitka?

A. It came in there to take a load of scrap.

Q. What type of scrap?

A. Well, it run everything. It was about 5,000 ton of landing mats, and there was all kinds of vehicles, trucks, and jeeps, tractors, trailers, and then just general and broken stuff, you know.

Q. And would you state again the name of your employer at that port?

A. Ace Tractor Company.

Q. And who are they and what were they doing there?

A. Well, they owned the—or bought the junk, and they employed me in Anchorage to come to Amchitka and load this load of junk on the ship.

Q. I see. By whom was the Edward A. Filene operated at that time?

A. You mean the company?

Q. Yes.

A. Oh, Olympic Steam, I think.

Q. And what was the name of your job that you took? What were you called?

A. Well, I was the loading boss. I was in charge of all loading operations.

Q. In what way did information of this injury to Seaman Calvin Sides come to your attention?

A. Well, I was just coming out of No. 3—I think it was No. 3 hold, now—just come on deck; and they hollered, ‘Someone got hurt in No. 4.’ So I run back there right away.

* * * * *

Q. How many loads were being worked on the vessel on or about the time of the accident?

A. Oh, there was 2, 3, 4 and 5 being worked.

Q. What duties did you have in regard to the work in those holds that you named?

A. I was in charge of loading all the hatches, and the sailors’ hatch, which was No. 2—see, I would tell the mate what I had coming, how I wanted it stowed, and he would, in turn, tell the sailors. Only on occasions I would go down there and maybe change something.

Q. What officer on the ship had any duty in regard to the over-all loading and stowage of cargo?

A. Well, the skipper and the chief mate. Naturally, they have.

* * * * *

Q. In your job as loading boss, did you have any supervision over any of the workmen on the vessel?

A. All of them, yes.

Q. And about how many of them worked under you?

A. Well, let's see. Aboard ship, I would say there was about 40—not counting the mates or the Old Man. I think about 40, between 40 and 45 men, I would say.

Q. How long a period of time before you heard of the accident had you been in the vicinity of the No. 4 hatch?

A. Well, it is kind of—it's been so long, it's a little hard to say exactly. See, I went from hatch to hatch all the time, and maybe I had been down in 5, or something, and maybe in 4, you know—it's so long ago, it is really hard to say just exactly when I did leave that hatch the last time.

Q. At the time you last had observed any work being done at the No. 4 hatch, what was going on there?

A. Well, they were flooring off.

Q. What does that mean?

A. Well, we had, roughly, I would say, 5,000 ton of this landing mat, which had been bundled up, and we were flooring off and winging up tier for tier, just saving head room for our other vehicles, you see, to go on—vehicles and stuff like that, that we could roll, to go on top of this landing mat.

Q. When you say winging off, what does that mean, particularly?

A. Well, you see, No. 4 is about—it is about 20 feet wide, the hatch, and I think it is about

20 x 20 or 20 x 30, something like that. Well, you can only land so many loads in the square to make an even floor, and then you have to go out into your wing tiers, and this landing mat weighed, oh, I would say, roughly, a ton a load, just about that, so the only way you can stow your wing tiers is to use snatchblocks and your gear to stow your wing tiers to come out to your square. See, you come like——

Q. Pardon me. Could you draw just a rough cross-section of the hatch, showing what you are describing, showing us how the lines run, and the use of the snatchblocks?

A. Here is the skin of your ship out like this and like that. Now, as you bring your loads into your hatch, this wing out here—here is the square of your hatch—this wing, of course, all has to be stowed.

* * * * *

Q. Would you write 'wing' where you have marked those two?

A. Yes (writing). I would say—say we floor off just about four high everytime that you build a floor in here. Here is just about the way your hatch would run here. This is the forward bulkhead and the after one, and this here is the skin of the ship out here, of course (writing). Say that we are starting right on the skin, right on the floor of the ship in the lower hold. You would start in the wing, would be the best, and you would come out maybe, oh, four high, I would say, just roughly, about four high. Well, you keep coming along four high, four high, four high, until you get out to where you can use your gear to load them. In this case here we would bring in on each

side of the shaft alley—I should have put that in down at the bottom of the hold there. The shaft alley runs down the square of the ship.

* * * * *

Q. Could you draw a cross-section of the hatch looking fore and aft so you could show us how the runner would go from the gear down to the snatch block in over to the load—in other words, a cross-section as you look forward, we will say?

A. I am not much of an artist, here.

Q. It would have to be on a separate—

A. You want it on a separate one?

Q. Now, is that a plan view you are showing us that you have drawn—in other words, you are looking down on the ship from above in that view?

A. Yes.

Q. Could you slit that ship in half on a piece of paper?

A. This is just the after end of the ship, you see—No. 5 hatch.

Q. Yes.

A. 4.

Q. On this sheet of paper, could you just slice the ship right down the center of No. 4 hatch, showing the hatch opening, and then show how the runner goes?

A. Well, I don't know. I will try. I think about the best way is to show your gear set up the way it is, the way it would be. Here is the square of the hatch, here. Here is your winches here. The booms—I just have to show the way the booms would run out. This one here would run about out like that, and the runner would come in, and this boom over here, of course, is going to be lower. It comes out over the side of the ship.

The runner comes in here, the blacksmith. I don't know how I could show this—that just shows the square of the hatch, and this runner, here—in this case, the port runner—goes back here under her to a snatch block (drawing).

* * * * *

Q. Now, Mr. Southerland, the method that you have described and which you have drawn in the two sketches, will you state whether or not that method was being used at any time at No. 4 hatch prior to the accident—in other words, the method of winging out that you have shown us?

A. Oh, yes. We had come up—oh, we must have come up one or two floors, at least.

Q. Now, how was the snatch block fastened, or secured, to the side of the ship, the skin of the ship?

A. Well, see, there is a beam—it is all ribs running down along the side, and we had the snatch block—had a strap through a hole in one of the ribs or beams, whatever they want to call them.

Q. When you say 'strap,' would you tell us what that is? What do you mean by that? Just describe it in words.

A. In this case, it was a short wire strap. It is a strap with two eyes in it, an eye in either end, and, of course, you have the bight through a hold or pad eye or beam clamp—whatever the case may be that you have to use at the time, you know.

Q. Where this work was being done on the vessel, Mr. Southerland, was any gear used except the ship's own gear?

* * * * *

A. The cargo gear naturally belonged to the ship—I mean the booms and runners and that sort of stuff. As far as slings and all that stuff, we furnish all of our own slings and that stuff but—

Q. When you say 'we', you mean whom?

A. Ace Tractor Company.

Q. And referring specifically to straps which you have described, will you tell us who furnished those?

A. Well, we furnished—we had a gear man that made the gear, and we had our own wire and gear and all, and we had a shop on the dock where he made this gear.

Q. And would you tell us whether or not the strap which you have described as a part of the gear that you mentioned—in other words, when you say you had a man who made the gear, would that include straps, or not?

A. Yes; all the stuff that we used to work—all the slings, straps, spreaders, and stuff like that was made by our gear man.

Q. Do you have any knowledge as to whether or not a strap and snatch block was being used at the time of Mr. Sides' injury?

A. Oh, yes.

Q. And do you have any knowledge as to whose strap that was?

A. Well, as far as I know, it was ours, but now if someone happened to pick up a strap, I wouldn't—to the best of my knowledge, I would say that it was ours, but I won't swear that I know that it was ours, because you know when they are loading the ship and everything is in a hubbub why if your arm was there and they wanted to use it

they would just put it in a snatch block and use it when they get excited, you know.

Q. Do you recall the name of the man you described as a gear man, who made up this various equipment?

A. No, no more, I wouldn't.

Q. Do you recall having at any time had any difficulty with the man on the dock who was making up this gear for Ace Tractor?

* * * * *

A. Well, when we started loading these bundles of landing mat, they use two plugs. They are about—must be about 18 inches long, and there is a wire strap from those two plugs, and they have—they must be about 3 foot long spliced in, and with an eye on the other end that goes on the blacksmith. Well, we were pulling these splices out, and I fired Ace Tractor Company's gear man and put another man in there splicing the wire.

* * * * *

Q. Mr. Southerland, do you know who was driving the winches at the time Sides was injured—that is, the winches at the No. 4 hatch?

A. Oh, yes, I know him. I can't think of the name now. It is another thing.

Q. Well, I will ask you, do you recall whether or not it was a man named Bigsley?

A. Yes, Bigley or Bigsley.

Q. Bigsley. Where did you first meet or know Mr. Bigsley?

A. Oh, he was there helping gather the scrap up, I guess, when I got there. I met him there when I came out to load the ship.

Q. And by what company was he employed?

A. He was employed by Ace Tractor Company.

Q. And what word did you give him when you reported to the operation?

A. Well, this Rodney Dean gave him—told me he was a winch driver.

Q. Now, who is Rodney Dean?

A. He is the—he was the expediter, I guess, for Ace Tractor Company.

Q. And by whom was he employed?

A. Ace Tractor Company.

Q. And what did you do with Mr. Bigsley concerning Mr. Dean's comments?

A. I put him on a set of gear.

Q. At any time did you form any conclusion, after observing his work, as to his ability or inability to operate winches? Answer that.

A. Well, he isn't a competent winch driver.

Q. Mr. Southerland, at what time after you reported to the vessel to work did you form any opinion as to Mr. Bigsley's competency or incompetency to drive winches?

A. When he first went to work.

Q. What experience have you, yourself, had in driving winches, Mr. Southerland?

A. About, oh, twelve years, I guess.

Q. And could you tell us just briefly, as laymen, what you, as an experienced winch driver, observed about Mr. Bigsley that permitted you to form a conclusion that he was not competent?

A. Well, I don't know how to explain it to you.

Q. Well, in other words, just what you saw him do and what it meant to you.

A. Well, here is—one way—now, you take a person that has any experience around gear like that—you know that gear is tested for five ton, but it isn't a good idea to take five ton right off

the dock, although it is done lots of times, but someone like him, you could tell him to pick up ten ton with it, and he just has no idea what the gear can do. I mean he is—put it this way: If he was here in the States where you had men, they wouldn't even let him take one load in. When he took one load, that would be the end of him.

Q. Did you have any conversation with the officers of the vessel prior to the accident concerning the incompetency that you observed in Mr. Bigsley?

A. Not that I can recall, no.

Q. From your experience as a winch driver and from observing the operation going on at Amchitka just prior to the accident, could you tell us just whether or not, in your opinion, the officers would have any reason to know that Mr. Bigsley was incompetent? Just 'Yes' or 'No.'

A. No.

* * * * *

Q. Assuming, Mr. Southerland, that the landing mats were being winged out, as you described it, by use of a snatch block and a strap on the skin of the ship, and assuming that the strap was not defective in any way, but that as a result of this work the strap did part, would you tell us from your experience as a winch driver what could have caused such an incident?

A. Well, you see, when you are heaving on anything like that that has to be stowed out in the wing, and you are using a snatch block, you just have to barely float it, because you have such poor drift anyway that you are almost pulling against the two runners, and if you try to go too high you

start pulling against the two runners, and something has to carry away. I mean something just has to give if you keep heaving on it.

Q. Is there any particular expression you use by the stevedores for such an action of the runners as you have described?

A. Well, tight-line them.

Q. All right. How soon after you heard the cry which indicated to you that an accident had happened did you arrive at the No. 4 hatch?

A. Oh, within a minute or so.

Q. And at that time, at the time you arrived, did you observe who was on the winches?

A. The winch driver.

Q. And which winch driver?

A. I can't think of his name.

Q. The same one?

A. Yes, the same one.

Q. Bigsley?

A. Yes, Bigsley or Bigley.

Q. How many other winch drivers were working on the vessel other than Mr. Bigsley?

A. Well, there was two winch drivers with each set of gear—that would be two, four, six—that would be seven others besides him."

(Record pp. 55-78.)

Cross-Examination.

* * * * *

"Q. Mr. Southerland, when did the ship commence loading scrap at Amchitka prior to this accident to Mr. Sides?

A. It came in prior to—around noon, I believe. We started getting everything ready and started work that afternoon.

Q. The accident happened, then, the day that operations were commenced?

A. No, no.

Q. How many days prior to the accident had the loading operation been under way?

A. Well, I wouldn't say right exactly the day, but I would say it must have been about, oh, maybe five days, something like that.

Q. And during those five days prior to the accident, loading was taking place in all five of the hatches at various times?

A. I believe we had worked all five. See, No. 2 worked steady all the time with sailors, and then the other gangs as we shifted around. Maybe I hadn't went in No. 1 yet. I wouldn't say for sure.

Q. Now, the sailors were loading No. 2 by themselves. Is that correct?

A. Yes. They had no longshoremen there.

Q. And some of the members of the crew of the Edward A. Filene were acting as hatch tenders and winch drivers at No. 2. Is that correct?

A. Well, they had their own winch drivers, yes.

Q. Now, in addition to the sailors working No. 2 hatch, they were also working other hatches in conjunction with the men from the shore that Ace Tractor had brought over to Amchitka. Isn't that correct?

A. We hired everyone we could—I mean for extra men, yes.

Q. And not only did you hire members of the crew, but you also hired officers of the Edward A. Filene to assist in this loading operation. Isn't that correct?

A. You mean like on the watch below or anything—yes.

Q. And particularly the second mate was one who worked down in the holds in the loading operation?

A. Bob White, yes.

Q. And also the chief officer?

A. I don't think that he worked—see, he was on deck all the time. You know what I mean.

Q. In other words, the chief officer was on deck generally supervising the operation at all times, wasn't he?

A. No. No. 2 hatch—

Q. He didn't exercise any supervision or inspect any of the hatches other than No. 2, to your knowledge, before this accident?

A. Oh, they inspected for stowage, yes.

Q. And in addition to the chief officer inspecting for stowage, the master also inspected the hatches other than No. 2, did he not, before the accident?

A. Yes, sir; yes, sir.

Q. Now, do you know whether the chief officer and/or the master received any compensation for those inspections?

A. Well, I wouldn't know about that.

Q. Now, with respect to members of the crew on the Edward A. Filene, who worked in these hatches, other than No. 2, did you have anything to do with approving the time sheets turned in for their work?

A. Yes.

Q. In other words you more or less certified that a particular crew member had worked so

many hours on a particular day. Isn't that correct?

A. Yes.

Q. Do you know how such a crew member was compensated for work in handling cargo in other than No. 2 hatch?

A. Well, I don't remember too well now, but I understood that it went in with the chart or some way—that is, the loading operations—except the extra men who were hired. I think they were paid by check when they went down south, but I wouldn't, you know, I wouldn't say. That is just what I was told, and it has been so long ago that I—

Mr. Blanpied. Indication of pausing.

Q. Now, in connection with the operation of snaking or pulling the lifts in No. 4 in under the wing, a great many slings were used, were they not?

A. Well, no, sir. We weren't using slings. We were using these plugs in these landing mats.

Q. The plugs were used to hold the mats into a bundle. Is that right?

A. No. These mats were bundled up, and then they had a wire around them, and there's holes—I don't know whether you have ever seen that landing mat or not.

Q. Yes, I have.

A. You have?

Q. Yes.

A. Then you understand those holes. Well, those holes line up, and you drop these two plugs right down in through these holes, you see. They are a steel plug about that big around (indicat-

ing). They drop right down through, and then, of course, the strap comes here and binds them.

Q. So that they don't shift when you are putting them in?

A. Yes.

Q. Well, now, you saw, did you not, the strap which parted in No. 4?

A. Yes. I rigged—I was there—it was rigged under my supervision.

Q. You actually rigged that particular sling to which the snatch block was secured?

A. Well, I didn't do the work, but I was there and supervised it.

Q. Well, who actually rigged it?

A. It has been so long ago now—the gang that was in the hold.

Q. Well, was it rigged to a beam, or was it rigged through a pad eye?

A. Well, let's see, now.

Q. If you don't know, just say you don't know.

A. Well, I wouldn't say, now, because that was shifted so many times, you know, right then at the time.

Q. In other words, this strap would be taken out and shifted to perhaps another structural member or to another pad eye on the side of the ship underneath the wing, as necessary from time to time?

A. Yes.

Q. And, of course, you weren't there every time that the strap was shifted, were you? The men in the hold would do the shifting as they deemed necessary. Isn't that true?

A. Well, no. I was there because they were more of a green gang, unless there happened to be someone there that was competent to do it, but as far as—I would say that most of the time I was there.

Q. Well, it is a fair statement, isn't it, that you weren't there every time this strap was taken off and the snatch block moved from one particular spot to another along the frame, the outside frame of the ship?

A. I guess that is true.

Q. Now, as a matter of fact, there were more than one strap similar to the one that parted in No. 4, weren't there?

A. I am not quite—let's see, now. There was more than one strap down there in the hatch.

Q. There was more than one strap in No. 4 of a similar design to the one which parted?

A. Oh, yes.

Q. As a matter of fact, on the ship you had about 100 straps that were similar in design and dimensions and size to the one that parted. Isn't that true?

A. No, I wouldn't say that many of that certain type.

Q. Well, say 50, then.

A. I think even that is a little bit strong. I mean—see, a short wire strap like that isn't—you just don't use them too—you see, we weren't using that on the cargo. If we had been using that on the cargo, then I would say, Yes, that there was that many down in the hold, but there was—I would say there was several of them around. There was on—maybe two or three like that, laying around the hold.

Q. Mr. Southerland, this operation of securing a snatch block underneath a wing to maybe the side of the ship, or to a pad eye along the side of the ship, that is frequently done, isn't it, when you are snaking in cargo from the square into the wings?

A. Yes.

* * * * *

Q. Are you familiar with any regulation of the Pacific Maritime Association prohibiting the use of booms when snaking cargo?

A. Up there—there is no prohibitions up in that country, none whatsoever. You do what you think you can get away with up there. I mean under the circumstances—you understand that they hire anybody on those jobs, and they don't understand a ship; they don't understand gear. And you have to get by just the best way you can. I mean up there it isn't like here. They have a lot of practices that you don't follow up north, and every port has different ones.

Q. Well, then, you are familiar with some regulations which frown on the use of standing gear to snake cargo?

A. Personally, I have never run across it, but I won't say that they don't have them, because, like I say, every port they have a little different regulations.

Q. Now, you don't recall, as I understand your testimony on direct, whether this particular strap that parted in No. 4 was rove through a pad eye, or just through one of the apertures in the frame along the skin of the ship. Isn't that correct?

A. Yes. It could have been through a limber hole or—I don't remember now just what it was.

Q. What did you call it—a limber hole?

A. That is what I call them. I think they have other names for them, but that is what I call them.

Q. Well, that is a hole, is it not, that is formed by the meeting of two—well, we will say the rib and one of the overhang beams?

A. Or where there is a hole cut in—they have those holes cut in, you know.

Q. Yes. And, for example, if you have a standing rib, they are designed with holes in them?

A. Yes.

Q. Maybe about three or four inches in the steel plate?

A. Yes.

Q. Now, let me ask you, if you have a strap that is rove through one of these holes, it comes in contact with a relatively sharp edge, does it not?

A. Yes.

Q. And by continued use or by excessive strain, it is possible that the strap will be cut by this—by the side of this aperture through which it is rove. Isn't that true?

A. Yes.

Q. Now, do you know whether or not the chief officer was a winch driver? Let me reframe the question. Perhaps it is not too intelligible. Do you know whether the chief officer of the Edward A. Filene was experienced in running winches of the type that were aboard that vessel?

A. Well, as far as actually being a winch driver, I don't think he was, but I wouldn't—

Q. As a matter of fact, you had seen him run one of those winches, a set of those winches, hadn't you?

A. Not the chief mate, I don't think.

Q. Well, then, it is a fair statement to say you don't know whether he was an experienced winch driver or not?

A. I think that is better.

Q. All right. Well, did you ever see the skipper operate one of the winches on the Edward A. Filene?

A. Yes, I seen the Old Man run one.

Q. Which set of gear was he running when you saw him operate winches?

A. Oh, I think he relieved several of the winch drivers at different times.

Q. You mean several times before this accident happened on board the Filene?

A. He would relieve them for a cup of coffee or something like that, you know.

Q. Was that an east coast or west coast rig that they had those winches on?

A. She was west coast. They had turned the winches and put levers on them—that is, one man operate them.

Q. So that two winches could be operated by a single man standing between them?

A. Yes.

Q. When did you form an opinion that this chap whom you noticed at the winches, at No. 4, right after the accident, was incompetent as a winch driver?

A. Oh, when we first started working cargo.

Q. Would you say two or three days before?

A. Well, whenever we started working cargo—four or five, or whatever it was.

Q. It was quite obvious to you that he didn't know what he was doing?

A. Yes.

Q. But you nevertheless let him go ahead and continued to run his gear?

A. I had no alternative.

* * * * *

Q. Now, were all of those winch drivers that were engaged in this loading before the accident, with the exception of this fellow Bigsley, competent winch drivers, in your opinion?

A. Well, I had one fellow before Bigsley I got rid of.

Q. And that was before the accident?

A. Yes.

Q. The rest of them seemed to know what they were about?

A. No, but that is all there was.

Q. You didn't see the accident, did you?

A. No, sir.

Q. You actually don't know what happened down there to cause the accident, do you?

A. No, just from what I seen afterwards, what I surmised, myself. I mean with using a little intelligence it doesn't take much to see what happened.

Q. Now, did you look at this strap that had parted in No. 4 when you arrived there after the accident?

A. Oh, after things had got quieted down and they had got blankets and a stretcher and all for Sides.

Q. It broke, didn't it? The splice didn't pull out. Isn't that correct?

A. It broke.

Q. From your experience with rigging, I take it that you will agree that a properly spliced wire cable will break—assuming that it is in good order—will break before a splice will pull out. Isn't that correct?

A. It should.

Q. The splice is actually stronger than the cable, itself. Isn't that correct?

A. Well, it couldn't be stronger, but it is just as strong as the cable.

Q. Was that $\frac{3}{4}$ -inch wire, or was it $\frac{5}{8}$, or do you know?

A. Well, now, I wouldn't say now whether it was $\frac{5}{8}$ or what it was, now.

Q. The Edward A. Filene was a Liberty ship, wasn't she?

A. Yes, sir.

Q. What kind of winches did she have?

A. Cog winches.

Q. Steam?

A. Yes.

Q. Did you inspect the winches after the accident to see if they were in good order and condition?

A. I didn't personally inspect them. We started working cargo again as soon as he was out of the hold." (Record pp. 78-96.)

Deposition of Gerald J. Reilly.

"Mr. Blanpied. This is the direct examination of Gerald J. Reilly, being questioned by Mr. Gallagher:

Q. Will you state your name, please?

A. Gerald J. Reilly.

Q. What is your occupation?

A. Captain of the Harry Lundeberg.

Q. You are a Master Mariner?

A. Yes, sir.

Q. How long have you been a Master Mariner?

A. Let's see, nine years.

* * * * *

Q. Captain, were you Master of the SS Edward A. Filene in June of 1948?

A. Yes.

Q. Was Calvin Sides a member of the crew of that vessel?

A. Yes.

Q. Was that vessel in Alaska during that month?

A. During that—

Q. During June of 1948?

A. Yes.

Q. During the time that the vessel was there was there any loading of landing mats going on?

A. Yes.

Q. Now, did Calvin Sides sign any Articles for the voyage and for his service aboard that vessel?

A. He signed on at San Francisco as I recall.

Q. For how long was he employed pursuant to those Articles?

A. Do you mean for that one voyage?

Q. Yes, what was the voyage for which he was employed?

A. From San Francisco to Alaska and back to the West Coast port.

Q. Did he at any time sign off the Articles?

A. Not that I know of, because he was in the hospital.

Q. Yes, I understand that, but up to the time that he was injured in Hold No. 4 he had not signed off the Articles?

A. No.

Q. In the loading of these landing mats were any plow wire straps used?

A. Yes.

Q. Do you recall the dimensions of the plow wire straps?

A. Well, it all depended on what you were loading.

Q. For these landing mats, for one load.

A. It is normally $\frac{5}{8}$ you use.

Q. Did you know that Calvin Sides was injured?

A. Well, sure.

Q. In what hold was he injured?

A. No. 4.

Q. Did you go into No. 4 hold after he was injured?

A. Yes, sir.

Q. Was he still in there?

A. He was still down in the hold.

Q. Was anything on top of him at that time?

A. I think they had already gotten it out of there when I got down there. They had already lifted it up.

Q. When you got down there was there any plow steel wire in the hold?

A. Winch falls and straps.

Q. Was there any plow steel wire strap which had broken in that hold?

A. Yes.

Q. Did you see that strap?

A. Yes. Do you mean the one they were using?

Q. Yes.

A. Yes.

Q. Did you see a plow steel wire strap which had broken?

A. Yes.

Q. Was there more than one broken plow steel wire strap in that hold at that time?

A. Only the one at that time.

Q. What was the size of that plow steel wire strap?

A. That was a $\frac{5}{8}$ strap.

Q. Do you know the breaking point of that type of strap; just answer 'Yes' or 'No'?

A. Yes.

Q. What is the breaking point of that type wire strap if the strap is in good condition?

A. It is around 14 or 15 ton.

Q. Are you also familiar with the safe working load of that particular type of wire strap?

A. Yes.

Q. What is the safe working load of that particular type of plow steel wire strap if it is in good condition?

A. About three tons. It is about a fifth of your breaking strain.

Q. Now, were you familiar with the ship's gear and equipment aboard that ship?

A. What do you mean by that?

Q. Well, did you have a personal knowledge of what part of the ship's gear was being used in the loading of these——

A. Do you mean booms and winch falls and——

Q. Yes.

A. They were all in good shape.

Q. What I am trying to find out is this: Do you know who owned the cargo gear consisting of the winches and booms and the falls?

A. Yes.

Q. Who owned those?

A. The ship.

Q. Did you know who owned the plow steel wire straps that were being used in the loading of Hatch No. 4?

A. Yes.

Q. Who owned those plow steel wire straps?

A. All that gear, all the stevedoring gear was brought on the ship by Ace Tractor.

Q. Would that include all of these steel wire straps?

A. All the steel wire straps, spreaders, and bridles, all that was all their gear.

Q. Was this particular strap that you observed and which had broken a part of the Ace Tractor Company gear?

A. Yes, we didn't have any stevedoring gear at all on the ship.

Q. Now, Captain, have you had experience in operating winches yourself?

A. Yes.

Q. Have you had such experience before this accident in which Mr. Sides was involved?

A. Yes.

Q. Did you actually observe the winch driver named Bigsby or Bigby operating the winch which was involved in Mr. Sides' accident at any time before the accident?

A. Well, I saw him there.

Q. Did he appear to you to be an incompetent winch driver or did he do anything that indicated to you that he was incompetent?

A. Usually the way you tell is when they break down your gear.

Q. So you didn't see him break any of your gear?

A. No.

Q. Nothing broke until the time of this accident?

A. That's right.

Q. Now, did this particular plow steel wire strap which had broken appear to you to be new or old?

A. Well, it had been used but it was a fairly new strap. An old strap would be rusty or you could tell they had been used. They get kinky.

* * * * *

Q. Prior to the time this accident happened—

A. What he said there, what do you mean that I didn't know how it was rigged?

Q. Did you know how it was rigged in Hold No. 4?

A. Sure, they had been taking that stuff aboard for a couple of days.

Q. Do you know how it was rigged?

A. Sure.

Q. Will you tell us how it was rigged in Hold No. 4?

A. It was roved through a limber hold in the frame and then they put the snatch block in the two eyes and moused it. Then you reeve your winch fall into that.

Mr. Blanpied. Q. Did you see it rigged in that fashion before this accident happened?

A. Sure, they had been working a couple of days on that gear.

Cross-Examination.

Q. Now, Captain Reilly, you have been discussing this case with Mr. Gallagher before I came in, haven't you?

A. Yes.

Q. Did Mr. Gallagher show you any statements which you previously made or signed concerning this accident?

A. No.

Q. All you have is what——

A. What he was telling me about this thing.

Q. Did Mr. Gallagher read something to you?

A. Well, it is about——

Mr. Gallagher. Then I said, 'This stipulation,' referring to the pre-trial stipulation which I had in my hand.

'About who is responsible' is the witness.

Mr. Wright. The last statement is from the witness.

Mr. Gallagher. Yes.

Mr. Wright. Q. Mr. Gallagher told you who was responsible?

A. No, no, the thing was, who was responsible as far as the equipment and what was in the charter party.

Q. Mr. Gallagher then told you whose strap this was; right?

A. No, he didn't tell me whose strap it was. I know whose strap it was.

Q. All right. Now, Mr. Reilly, the ship had straps, 5/8-inch wire straps identical to the one which you observed broken in No. 4 hatch, didn't it?

A. No.

Q. If I were to tell you that the Chief Officer, Mr. Burgstrom, and you are familiar with him, testified that the ship did have a number of straps identical to the one which we believe was broken in No. 4 hatch, would that change your testimony?

A. No. You said that the ship had straps in No. 4 hatch. Our straps would be in the forepeak or afterpeak locker.

Q. Well, perhaps I didn't make myself clear. It is true, is it not, Captain Reilly, that the ship did have on board wire setups which were similar in appearance and design to the one which you observed broken in No. 4?

A. Right, aboard the vessel, but not in use.

Q. Well, were you in No. 4 hold at the time the cargo was being worked?

A. How could I do that?

Q. You weren't, were you?

A. No.

Q. You did inspect No. 4 as well as the other hatches from time to time in the course of your duties, didn't you?

A. That's right.

Q. You observed how they were carrying out operations?

A. How they were loading?

Q. Yes.

A. Yes.

Q. Now, in addition to your carrying out that duty of inspection, the Chief Officer, Mr. Burgstrom, also did it, didn't he?

A. That's right.

Q. Captain, you actually didn't see the way that the runners were located with relation to the

strap which you state was broken in No. 4 at the time of the accident, did you?

A. Do you mean right at that moment when it happened?

Q. Yes.

A. Well, unless they had changed it. You see, what they had been doing, they would bring in, say, eight or ten loads of two at a time and then they would rig up out in the wings and heave them back out in the wings.

Q. In other words, it was an operation which required a frequent change of the position of this sling, didn't it?

A. Well, no. You just change from bringing the loads into the hold with your bridle, then you drop all in the square, and then they take and put the winch fall—your yardarm fall would go into this block, and you would lift it up, see, and then you would set it in. You slack away on your midships.

Q. Well, then is it a fair statement to say that after a number of loads were landed in the square of the hatch it then became necessary to unhook one of the runners, either the port or the starboard, and from the blacksmith—

A. No, no, you leave it in the blacksmith. You just took the bit and put it in the snatch block.

Q. It is the same thing, you could unhook from the blacksmith and reeve it through the snatch block, but you say they merely opened the snatch block which was secured to the sling and put the runner in when they wanted to float it into the wings; right?

A. You use the same bridles. You don't disconnect anything, take the bit of the wire and put it in the snatch block.

Q. Yes, well, now, that would entail moving the runner, we'll say, distance of perhaps 10, 15 or 20 feet to the wings where you could open the snatch block, put it in and then secure your snatch block again and then knot her in; right?

A. Right.

Q. Now, in addition to the operation of loading it required the position of the sling which was holding the snatch block to be moved from time to time, didn't it?

A. No.

Q. In other words, you could load the entire hatch by keeping the snatch block in the same position?

A. Two straps, there are two straps. One over in the aft end and another strap in the midships there. Those No. 4 hatches have a deep tank in the lower hold which gives you—you don't have the full length of the hatch because you have a deep tank at the fore end so all it entailed was the movement of that twice. You load the aft end first and then you start in the midships.

Q. Well, now, that would permit you to drop the load under the square of the hatch in the place where the sling and block were, isn't that right?

A. Well, you dropped the load in the square of the hatch.

Q. Yes——

A. And when you wanted to float it in to the wing——

Q. And it is your testimony then that the forward and the after slings were never moved during this entire operation; is that your testimony?

A. I don't think so. I wouldn't be positive

due to the fact I wasn't down in the hold all the time.

Q. It is possible they might have changed the position of the sling and moved to another limber hole?

A. It is possible.

Q. Well, then it is possible that this strap was moved from place to place in the hold?

A. Yes, it would be just on the one side. It would be just on the one side because the shaft alley is in between and they take so many loads on the one side and take so many loads on the other side, four men working on each side.

Q. Now, Captain, this limber hold that you have described or spoken of, can you tell us what that is or what it looks like?

A. Well, I can draw a picture of it. That is the side of the ship and this, it is a stiffening plate in there, a hole in there, evidently if there is any strain in there—cut a hole to keep it from going further if there is a break or anything, they have the hole in there. I really couldn't tell you the technical reason but it is an understood fact it is there so if anything would break it wouldn't go any further due to the fact that you have the hole in there.

Q. Let's see, a limber hole is a hole, I take it, about three or four inches in diameter?

A. Yes, about that.

Q. Which is cut in a steel plate which forms one of the vertical members of the ship's structure; isn't that about it?

A. Yes.

Q. Now, the strap is roved through that; isn't that right?

A. Yes.

Q. Now, through use the strap will come in contact with the edge of that limber hole, won't it?

A. That's right.

Q. And that edge is about a quarter of an inch across, isn't it?

A. Well, it all depends on what size the plate is.

Q. Do you recall, on the Edward A. Filene, what the size of the plates were where these limber holes were?

A. Well, it is a standard Liberty ship but I couldn't tell you what the size of the plating is. Maybe $\frac{3}{8}$ or $\frac{1}{2}$.

Q. Or $\frac{1}{2}$ -inch?

A. I would say it was a half or maybe a little greater due to the fact that is holding up your tween decks, there, see.

Q. Yes, and that presents a rather sharp surface to anything which is pressing or pulling against the circumference of the limber hole, doesn't it?

A. Yes.

Q. Now, what was the size of the runners which were being used in the gear in No. 4?

A. $\frac{5}{8}$, 619.

Q. It is sometimes the practice, isn't it, Captain, when you have used a runner for some length of time to replace it and to use the old runner for making straps?

A. Well, it isn't too prevalent any more except on the steam schooners.

Q. Well, the Edward A. Filene was in effect on the steam schooner trade, wasn't it?

A. No, we were strictly from hunger because none of the fellows had ever been up there before except myself and the Second Mate.

Q. All right. Now, in addition to Mr. Sides in No. 4 there were other members of the crew working there in that hatch, weren't there, at the time of the accident?

A. Yes.

Q. Do you recall how many there were, Captain?

A. Eight.

Q. How long before this accident had you commenced any cargo loading in No. 4?

A. Well, I think that we used to start at 7:00 o'clock and we worked until either 11:00 or 12:00. I think it was 11:00 o'clock.

Q. I mean, is it correct that the loading operations in No. 4 had been going on three days before this accident happened?

A. Oh—got in there on a Sunday. What day was it on? We got in on a Sunday up in Amchitka—what day was it the accident happened?

Q. Well, I don't know, Captain. Do you have any recollection as to about how many days you had been loading cargo in No. 4 before this casualty happened?

A. A couple of days due to the fact we hadn't gotten—it wasn't over that because we hadn't gotten over the top of the shaft alley yet.

Q. Now, Captain, you told us that the strap which you observed to be broken down in No. 4 was the equipment belonging to Ace Tractor?

A. All the stevedore equipment was brought on. We didn't have any actual stevedoring equipment. We did have, like you said, there was wire

straps on the ship, but they weren't used in the actual stevedoring operation. Those straps were for our own use on the ship like, say, you had to overhaul a lifeboat or something.

Q. Yes, but it is a fair statement to say, isn't it, that it is possible that that strap which you observed broken down there might have been the ship's strap?

A. I don't know how it could have been unless they went in the lockers and took it out of there.

Q. It is possible, isn't it, Captain?

A. Well, I guess it is, but it wasn't supposed to be—it wasn't supposed to be used because all the stevedoring equipment was supposed to be brought aboard by Ace Tractor.

Q. Is it a fair statement to say that when you tell us that the strap which you observed broken down there in No. 4 hatch belonged to Ace Tractor, that you make that statement on the basis of what should have been the case?

A. That's right, I'd say that.

* * * * *

Redirect Examination.

Q. Captain, you say that the ship did have some plow steel wire straps approximately $\frac{5}{8}$ inches in diameter in the forepeak and some other place?

A. In the afterpeak. Well, any ship has had some straps.

Q. But those straps you say were not to be used by the stevedore?

A. Well, usually you keep all your gear rooms locked up when you come in because of the fact people do go around stealing your equipment.

Q. Well, if these people, that is, the Ace Tractor Company people, got a strap which belonged to the ship was that obtained with your consent or permission?

A. No.

Q. And in order to get a strap of that type which actually belonged to the ship would they in effect have to steal it?

That wasn't answered.

Mr. Wright. Q. Well, did you give Ace Tractor Company any permission at any time to use any strap belonging to the ship?

A. No.

Q. You did see this strap which broke down in Hold No. 4?

A. Yes, after the accident.

Q. And from your observation of that strap in the hold can you tell us whether it was or was not part of the ship's equipment?

A. Well, there wasn't any actual markings on the straps, you know. Our straps weren't marked. Neither was theirs.

Q. Well, when you said that the basis of your statement that this broken strap was a strap which belonged to the Ace Tractor Company, which was what should have been the case, what did you mean by that?

A. All the stevedoring equipment that was to be used, and according to the contract, was to be furnished by Ace Tractor Company. The only thing according to the charter party was that we would—our gear would handle five tons, and if I am not mistaken, the jumbo gear was supposed to be for 25 tons. In fact, there was a couple of wires to the effect that there wasn't anything in

the charter party originally about it and I wired Seattle about using the jumbo gear.

Q. Well, did you see Ace Tractor Company equipment being brought aboard the vessel for use in the loading operations?

A. Yes.

Q. Did that equipment include straps which were brought from the dock?

A. That's right.

Q. That is, these particular plow steel wire straps, $\frac{5}{8}$ of an inch in diameter?

A. Yes, the particular type of straps.

Q. Yes, the particular type of straps that were being used in Hold No. 4?

A. Yes, they are in various lengths.

Q. Well, regardless of their length, was this strap which broke and which you observed in a broken condition in Hold No. 4 a strap of the kind that was brought aboard by Ace Tractor?

A. Would you give me that again?

(The pending question was read by the reporter.)

A. I would say 'yes.'

Q. Did any person purporting to represent Ace Tractor ask you for permission to use any of the ship's equipment excepting the winches and the cargo falls and booms?

A. Not to my recollection, no.

* * * * *

Further recross-examination by Mr. Wright.

Q. Captain Reilly, you didn't personally issue every piece of rope or strap that was used on board the Edward A. Filene, did you?

A. No.

Q. As a matter of fact, the boatswain, the Chief Mate, any of the officers could have gotten

any of the gear out of either the locker in the forepeak or the afterpeak without checking with you or asking your permission?

A. That's right.

Q. Captain, you actually relieved the winchmen during various times of this unloading job?

A. Once in a while.

Q. Up at Amchitka?

A. Yes.

Q. And operated the winches during the relief periods?

A. Yes." (Record pp. 119-142.)

Testimony of Raymond G. Stanbury.

Raymond G. Stanbury, called as a witness on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

"The Clerk. Your name, sir?

The Witness. Raymond G. Stanbury.

Direct Examination.

By Mr. Wright.

Q. Mr. Stanbury, you are an attorney at law, licensed to practice in the State of California, and also admitted to the Bar of this Court, are you not?

A. Yes, I am.

* * * * *

Mr. Gallagher. Mr. Stanbury represented Ace Tractor in a suit which was pending in the Superior Court of the State of California, entitled Calvin Sides v. Ace Tractor & Equipment Co.

The Witness. That is right.

* * * * *

Q. (By Mr. Wright) I now show you a letter on the letterhead of Cannon & Callister, law offices, dated December 16, 1949, and ask you if you have ever seen that letter.

A. Yes, I have.

Q. And I show you a letter which bears the letterhead of Bogle, Bogle & Gates of Seattle, Washington, dated December 10, 1949, and ask you if that letter, together with its attached sheet on the letterhead of Levinson & Friedman, accompanied the letter which I previously showed you of Cannon & Callister dated December 16, 1949?

A. That is right, it did.

Q. (By Mr. Wright) Mr. Stanbury, I show you another letter dated December 28, 1949, on the letterhead of Murray H. Roberts, dated December 28, 1949, addressed to Parker, Stanbury & Reese, and ask you if you have ever seen that letter before?

A. Yes.

Q. Where?

A. Well, I saw it when it arrived in my office, and I saw it again this morning.

Q. Did you see it on or about the date which it bears, December 28, 1949?

A. Well, somewhere around that time. I got it as a reasonably current letter.

Cross-Examination.

By Mr. Gallagher.

Q. Mr. Stanbury, when you received this letter from Cannon & Callister, with its enclosure, did you on behalf of Ace Tractor & Equipment Co. make any reply to Bogle, Bogle & Gates, or to the Olympic Steamship Co.?

A. I am almost certain I didn't. My file no longer exists, but I have a recollection about it, and my best recollection is that I made no reply to it.

Mr. Gallagher. That is all.

The Court. Were you actively handling the matter at that time?

The Witness. I was, Judge, yes.

* * * * *

The Court. The letter approving the settlement, I think, bears Mr. Stanbury's signature.

Mr. Gallagher. Yes, it does.

The Witness. That is right, Judge.

The Court. If I recall the stipulation——

The Witness. That is right, Judge.

The Court. ——from what I understood, you were being brought in for today was to show when Olympic said to Ace, 'You are the guilty party here. You owe Sides so much money. You did us wrong by having negligent, or having unseaworthy equipment negligently managed, operated and controlled,' and so on, that Mr. Stanbury just sat back and said nothing in reply to the accusation.

The Witness. I remember that, and my reasons for that.

Mr. Wright. May I ask a question?

The Court. Yes.

Redirect Examination.

By Mr. Wright.

Q. Mr. Stanbury, you said you recall you did not reply to the letter of Bogle, Bogle & Gates, dated December 10, 1949, which was sent to you by Messrs. Cannon & Callister?

A. That is right.

Q. If you did not, can you tell us why you did not?

The Witness. The letter was written to my client and therefore I did not feel that any answer was necessary, for the sake of courtesy, and I had already written them a letter before, in which I declined, on behalf of the company, any liability.

Recross-Examination.

By Mr. Gallagher.

Q. Mr. Stanbury, the letter you referred to in your last answer is the original of this photostatic copy of a copy dated May 20, 1949, addressed to Messrs. Bogle, Bogle & Gates, Seattle?

A. You mean the answer that I referred to having made previously? That is it (indicating).

Q. When you said you wrote and denied liability, that is the full letter to which you refer?

A. That is it. That is the full letter I referred to." (Record pp. 151-159.)

ARGUMENT.

The Voyage Charter Party provides that "the Vessel will permit the use of Ship's winches and other appropriate gear actually on board." (Respondent's Exhibit B, Part II, 2.(b).)

By the application of the maxims "ejusdem generis" and "expressio unius est exclusio alterius" it is clear that Ace Tractor & Equipment Company was required by the terms of the contract to furnish and

supply all equipment required in the performance of the stevedoring work excepting "winches and other appropriate gear actually on board." Otherwise there would have been no reason to include in the indemnity clause an agreement by Ace Tractor & Equipment Company to indemnify the vessel and its owner "for any damage or expense caused by the act or neglect of the Charterer * * * or from failure of equipment supplied by them."

With reference to the ownership of the wire strap which broke, Appellant makes much of the propositions that Gene Southerland said "I won't *swear* that I know that it was ours" and that Captain Reilly said that his statement that the broken strap in No. 4 hatch belonged to Ace Tractor was made "on the basis of what should have been the case."

Each of these statements has been lifted out of its context by Appellant and has been blown up out of all proportion to reasonable interpretation.

With reference to the isolated excerpt taken from the testimony of Gene Southerland it is obvious that all the witness meant by his expression was that he could not be *absolutely* certain that the particular strap which broke was the property of Ace Tractor & Equipment Company. He explained and limited his particular observation. The entire answer as it appears in the record, but not in the Appellant's opening brief, is as follows:

"Well, as far as I know, it was ours, but now if someone happened to pick up a strap, I wouldn't—to the best of my knowledge, I would

say that it was ours, but I won't swear that I know it was ours, because you know when they are loading the ship and everything is in a hub-bub why if your arm was there and they wanted to use it they would just put it in a snatch block and use it when they get excited, you know."

With reference to the testimony of Captain Reilly, what actually occurred is as follows:

"Q. Now, Captain, you told us that the strap which you observed to be broken down in No. 4 was the equipment belonging to Ace Tractor?"

A. All the stevedore equipment was brought on. We didn't have any actual stevedoring equipment. We did have, like you said, there was wire straps on the ship, but they weren't used in the actual stevedoring operation. Those straps were for our own use on the ship like, I say, you have to overhaul a life boat or something.

Q. Yes, but it is a fair statement to say, isn't it, that it is possible that the strap which you observed broken down there might have been the ship's strap?

A. I don't know how it could have been unless they went in the lockers and took it out of there.

Q. It is possible, isn't it, Captain ?

A. Well, I guess it is, but it wasn't supposed to be—it wasn't supposed to be used because all the stevedoring equipment was supposed to be brought aboard by Ace Tractor.

Q. Is it a fair statement to say that when you tell us that the strap which you observed broken down there in No. 4 Hatch belonged to Ace Tractor, that you make that statement on the face of what should have been the case?

A. That's right, I'd say that.

* * * * *

Q. Well, did you give Ace Tractor Company any permission at any time to use any strap belonging to the ship?

A. No.

* * * * *

Q. Well, when you said that the basis of your statement that this broken strap was a strap which belonged to the Ace Tractor Company, which was what should have been the case, what did you mean by that?

* * * * *

A. All the stevedoring equipment that was to be used, *and according to the contract*, was to be furnished by Ace Tractor Company. The only thing according to the Charter Party was that we would—our *gear* would handle five tons, and if I am not mistaken, the jumbo gear was supposed to be for twenty-five tons. In fact there was a couple of wires to the effect that there wasn't anything in the Charter Party originally about it and I wired Seattle about using the jumbo gear.

Q. Well, did you see Ace Tractor Company equipment being brought aboard the vessel for use in the loading operations?

A. Yes.

Q. Did that equipment include straps which were brought from the dock?

A. That's right.

Q. That is these particular plough steel wire straps, $\frac{5}{8}$ ths of an inch in diameter?

A. Yes, the particular type of straps.

Q. Yes, the particular type of straps that were being used in Hold No. 4?

A. Yes, they are in various lengths.

Q. Well, regardless of their length, was this strap which broke and which you observed in a broken condition in Hold No. 4 a strap of the kind that was brought aboard by Ace Tractor

* * * ?

A. I would say yes.

Q. Did any person purporting to represent Ace Tractor ask you for permission to use any of the ship's equipment excepting the winches and the cargo falls and booms?

A. Not to my recollection, no."

Appellee will not labor this point but it is quite clear that the first paragraph on page 11 of Appellant's opening brief is not only misleading but inaccurate. Said portion of Appellant's brief is based upon isolated remarks taken out of context and in utter disregard of the whole testimony of the two witnesses upon the same subject matter.

In addition to the provisions of the contract between the parties, the record contains substantive evidence showing that the strap which broke had been supplied by Ace Tractor & Equipment Company. In libellant's Exhibit No. 4, letter of Bogle, Bogle & Gates, dated March 22, 1949, it was stated that the agents, servants and employees of Ace Tractor & Equipment Company "in the course of loading cargo into No. 4 lower hold of the vessel, caused a portion of the gear supplied by (Ace Tractor & Equipment Company) to part." In the answer to this letter, Libellant's Exhibit No. 5, there is no denial of this statement.

Respondent's Exhibit D is another letter written by Bogle, Bogle & Gates to the respondent. It is dated December 10, 1949. In this letter the following statement is made:

“We might advise that we have available for trial by deposition and in person the various crewmen and Ace Tractor longshoremen who were working in the hold at the time of Sides' injury. These men all state that the particular strap which broke was one supplied by Ace Tractor & Equipment Company * * *”

This letter was transmitted to Raymond G. Stanbury, Esq., of Parker, Stanbury & Reese, by Reed E. Callister, with the following request:

“Since you are handling this matter, will you kindly make what reply, if any, is necessary to this letter on behalf of the Ace Tractor & Equipment Company.”

No reply of any kind was made.

In *In re Estate of Ricks*, 160 Cal. 450, 117 Pac. 532, the Court states as follows:

“It is claimed that the declaration made by the testatrix at the time of the quarrel—namely: That appellant had told her at the time of the division that contestant had agreed to take no further part of the property, could not be considered by the jury to establish the fact that he had made such a statement or representation to her. This may be conceded as correct. The jury, however, had a right to take into consideration the conduct of the appellant in connection with the statement of the testatrix as an admission on

his part of the facts stated by her. (See *Estate of Snowball*, 157 Cal. 311, 107 Pac. 598.) * * * The statement of the testatrix at the time of the quarrel between the brothers,—namely, that Hiram L. Ricks had told her of such an agreement at the time the division was made, was made in his presence. If it was not true it called for a denial by him. As it was not denied, it was only natural to consider it as an admission of the truth of the statement by the only one to be affected by it—an acquiescence in the truth of the fact stated, implied from his conduct in allowing it to go unquestioned.”

Appellee suggests that what the Supreme Court of the State of California said, as aforesaid, is applicable to the failure on the part of Ace Tractor & Equipment Company to deny the assertion that the strap which broke was one which had been supplied by it. This is particularly true, in the case at bar, because an experienced lawyer, skilled in the knowledge of the rules of evidence and the effect of silence when something more than silence is required, was employed to make answer to the letters, including the accusatory statements contained therein.

The Appellant complains that “Eye witness testimony or real evidence (e.g., the strap itself) are nowhere in existence.” (Appellant’s Opening Brief, p. 11.) In view of the fact that the evidence shows that the strap belonged to Ace Tractor & Equipment Company and that it supplied the same for use at the time of the accident, the Appellant is effectively accusing itself of having withheld the evidence. If the

Appellant knows, as its proctor asserts, that the strap is "nowhere in existence" then the Appellant must have knowledge of the fact that the strap was destroyed or thrown away. It is significant that proctor for Appellant did not say that the strap was not produced in evidence. He said it is "nowhere in existence."

A. The evidence is sufficient to show that the strap which broke was an unseaworthy appliance.

Captain Reilly testified that the ship's gear "would handle five tons". (Record, p. 140.)

Gene Southerland stated as follows:

"* * * you know that gear is tested for five tons, but it isn't a good idea to take five ton right off the dock, although it is done lots of times, but someone like him, you can tell him to pick up ten tons with it, and he just has no idea what the gear can do." (Record, p. 73.)

Captain Reilly testified that the breaking point of the type of wire strap which broke, if the strap is in good condition, is around 14 or 15 tons. (Record p. 123.)

If the ship's gear would handle five tons and was tested for five tons it seems obvious that the wire strap would not have broken, if it had been in good condition, as a result of the amount of strain which could have been applied to it by gear which would handle only five tons and was tested for five tons. The wire strap, in good condition, would not have broken until it was subjected to a tension of fourteen or fifteen tons.

The load of landing mats which was being dragged or pulled from the square of the hatch toward the wing of the hold weighed only 2,000 pounds.

“If the block was being put to a proper use in a proper manner, as found by the District Judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.”

Petterson v. Alaska SS Co., 205 Fed. 2d 478, 479.

The same observation is applicable to the strap which broke in the case at bar.

Ace Tractor & Equipment Company expressly agreed to indemnify Olympic Steamship Company for any damage or expense caused by the act or neglect of Ace Tractor & Equipment Company or its agents performing any of its duties in the loading of the Vessel “or from failure of equipment supplied by them.” It is clear that there was a failure of equipment, to-wit: the wire strap, supplied by Ace Tractor & Equipment Company. When it parted there was obviously a failure of said strap.

B. There is ample evidence in the record to support the finding that the winch operator was incompetent.

In addition to testimony of Gene Southerland with reference to the winch driver, said testimony having been based upon an opportunity to observe the winch driver for a period of several days, libelant’s Exhibit No. 4, letter dated March 22, 1949, contains a direct statement that the parting of the wire strap

“resulted from the negligence of a young and inexperienced winch driver employed by you to operate the winches at this particular hatch.

* * * * *

“Our investigation indicates that although the gear and rigging supplied by the ship for your use was in perfect condition, your winch driver caused the gear to become tight-lined, resulting in the breaking of a steel strap in the lower hold.”

There is no denial of this accusation in Libelant’s Exhibit No. 5, the letter dated May 20, 1949, purportedly prepared as a reply to the said letter of March 22, 1949. There was, therefore, an admission by Ace Tractor & Equipment Company of the accusation that the winch driver was young and inexperienced.

In addition to the testimony of Gene Southerland, the stipulation, Libelant’s Exhibit No. 1, after referring to the action for damages which had been commenced by Sides against the Ace Tractor & Equipment Company in the Superior Court of the State of California in and for the County of Los Angeles contains the following language:

“. . . the basis of said action being the negligence of the Ace Tractor & Equipment Co., Inc., a corporation, which caused the accident and injuries, as described hereinabove; . . .” (Appendix to Brief of Appellant, p. 180.)

In the case of *Petterson v. Alaska S.S. Co.*, 205 Fed. 2d 478, the Court held that it makes no difference whether defective equipment is brought aboard a vessel by the stevedoring company or is part of the

regular equipment of the vessel. In either event the vessel is unseaworthy. It should also follow that if an incompetent winch driver is brought aboard a vessel it makes no difference whether the winch driver is employed by a stevedoring company or by the owner of the vessel. The presence of such incompetent winch driver results in the conclusion that the vessel is unseaworthy. (*Petterson v. Alaska S.S. Co.*, supra.)

It is suggested on page 26 of the Appellant's opening brief "that if the strap had been rigged through a limber hole it would have come in contact with a relatively sharp surface and that it is possible through continued use or excessive strain for the strap to be cut."

Appellee does not see how this possibility could help the Appellant. The law imposed upon the Appellee a non-delegable duty to supply *and keep in order* the appliances appurtenant to the unloading of the cargo. If the strap became defective by reason of the use to which it was put, such defective condition was the sole proximate result of the acts of Appellant in using and continuing to use the strap until such time as it became weakened by being cut. Certainly this would not excuse the Appellant from its obligation to indemnify appellee.

"Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as

between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of danger, he acquiesced in the continuation of the condition." (Restatement, Restitution, Sec. 95.)

"A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability." (Restatement, Restitution, Sec. 96.)

There is nothing *transitory* about an incompetent winch driver. An incompetent winch driver is a menace and hazard from the instant he walks aboard a ship until he gets off of it. An injury suffered by a seaman in consequence of the incompetence of a winch driver brought aboard the vessel to operate a winch thereon results in an absolute liability on the part of the ship owner pursuant to the unseaworthiness doctrine. If, as is claimed by the Appellant in its brief, the breaking of the strap could have been caused by "tight-lining" (Appellant's Opening Brief, p. 12) by a young and inexperienced winch driver, there is little room for doubt about the proposition that the injuries suffered by Sides were a proximate result of the incompetence of such winch driver. Appellant is responsible for this as an indemnitor without reference to the express contract of indemnity set forth in the charter party.

CONCLUSION.

Because of the failure of the Appellant to perform its duty to the Court in reference to printing in its brief a full and fair resume of the entire evidence it was necessary for the Appellee to do so. It is clear, when all of the evidence is considered, that there is ample support in the record of all of the material findings of fact.

With reference to the principles of law involved, Appellee could have cited a long list of cases but they all boil down to the concise language used in the Restatement of the Law, Restitution, Sections 95 and 96. It therefore seems unnecessary to burden the Court with a lot of quotations from decisions.

It is respectfully contended that the Appellant has not sustained its burden of showing that the trial Court was in error in the findings of fact, conclusions of law or the final decree and that the judgment should be affirmed.

Dated, Los Angeles, California,
October 29, 1954.

Respectfully submitted,

LASHER B. GALLAGHER,
Proctor for Appellee.